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No. 91-719

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

AL C. PARKE, WARDEN — PETITIONER

- versus -

RICKY HAROLD RALEY — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

Respectfully submitted,

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Pursuant to Rule 15.7 of this Court, the petitioner, Al C. Parke, Warden of the Kentucky State Reformatory, and the Attorney General of the Commonwealth of Kentucky hereby supplement their previously filed petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The opinions cited in this supplemental brief have been published by the West Publishing Company (or in the case of a not yet published opinion, issued by the court) subsequent to the filing of the petitioner's petition for writ of certiorari.

In United States v. Ruo, 943 F.2d 1274, 1275-1277 (11th Cir. 1991), the Eleventh Circuit held that the defendant had the burden to prove the constitutional invalidity of his prior convictions offered by the prosecution to enhance his sentence pursuant to the Armed Career Criminal Act, Title 18 U.S.C. §924(e) and §922(g)(1). The Eleventh Circuit specifically approved previous opinions of the Seventh Circuit, United States v. Gallman, 907 F.2d 639

at 643 (7th Cir. 1990), cert.denied 111 S.Ct. 1110 (1991), and United States v. Ferguson, 935 F.2d 862 at 866-867 (7th Cir. 1991). [See Petition p. 25.)

In Dressler v. State, 819 P.2d 1288 at 1290-1296 (Nev. 1991), the Nevada Supreme Court ruled that if the state court record of the prior conviction offered for enhancement indicated that the defendant was represented by counsel or otherwise does not raise on its face a presumption of constitutional infirmity, the defendant is required to present evidence that the prior conviction is constitutionally infirm in order to rebut the presumption of regularity of the criminal conviction. The Nevada Supreme Court cited, inter alia, United States v. Gallman, supra; and Dunn v. Commonwealth, 703 S.W.2d 874 at 876 (Ky., 1985), cert.denied 479 U.S. 832 (1986) The Nevada Supreme Court also stated in part, 819 P.2d at 1292:

> While it is true the courts may not imply a waiver of the constitutional rights from a silent record, it is also true that courts should not imply a constitutional deficiency in a judgment of conviction from a silent record.

The records regarding the prior conviction attacked by Dressler (like the prior conviction attacked by Raley) indicated that Dressler had been represented by counsel during his guilty plea to the prior conviction, but did not reflect an express waiver and enumeration of his constitutional rights as arguably required by Boykin v. Alabama, 395 U.S. 238 (1969). Nevertheless, the Nevada Supreme Court concluded that Dressler had failed to establish the invalidity of his prior conviction and affirmed the judgment and sentence of the trial court. "Thus, appellant failed in the district court to rebut the presumption that the prior conviction was constitutionally obtained." 819 P.2d at 1296. Nevada apparently follows the Kentucky rule regarding the defendant's burden for collateral attack on a prior conviction offered for sentence enhancement. [See Petition pp. 27-28.}

In United States v. DeForest, 946 F.2d 523 (7th Cir. 1991), the defendant attacked the prior convictions used to enhance the sentence

pursuant to the Armed Career Criminal Act. The Seventh Circuit again reiterated its rule from previous cases that the defendant bears the burden of demonstrating the invalidity of a prior conviction offered for sentence enhancement. The federal district court and the Seventh Circuit both expressly rejected DeForest's own self-serving testimony which he offered in an attempt to satisfy his burden. In discussing the validity of one of the three (3) prior convictions, the Seventh Circuit stated in part, 946 F.2d at 526:

> The voluntariness of the plea was even more apparent in view of the fact DeForest's prior convictions gave him some familiarity with the criminal justice system, and his change of plea after trial and conviction show an awareness of the right to plead not guilty.

Thus, the Seventh Circuit has recognized that the defendant's prior convictions are an appropriate factor to be considered in ascertaining the validity of a guilty plea at the time that it was entered. [See Petition at pp. 30-31.]

In United States v. James Lee Evans, ____ F.2d ___ (6th Cir. Nos. 90-6589 and 90-6590) (December 17, 1991), the Sixth Circuit reviewed, inter alia, the defendant's motion to withdraw his guilty plea because of an error in accepting the plea pursuant to Fed.R.Crm.P. 11(c). The Sixth Circuit upheld the District Court's decision to deny the motion for leave to withdraw the guilty plea. Slip.Op. at 2. The Sixth Circuit in upholding that decision discussed the District Court's reasons for that ruling, and stated in part, slip op. at 5:

> While conceding that he had not followed Rule 11(c) precisely in accepting the guilty plea, Judge Allen pointed out that Evans had recently been through a lengthy criminal trial in which he was found guilty, and had been sentenced by Judge Simpson. Therefore, Judge Allen concluded that Evans was aware of any constitutional rights that had not been specifically detailed at the plea session. Moreover, Evans had requested that the CCE [Continuing Criminal Enterprise] case be consolidated for the specific purpose of pleading guilty. He had made this motion with the advice of the retained counsel and with the knowledge of the scope of the government's case against him. Judge Allen then applied the harmless error provision of Rule 11 (h) and denied the motion.

Judge Allen was also the judge that denied Raley's petition for habeas corpus relief in this case. [See petitioner's appendix, p. A21.] The reasoning employed by Judge Allen in Evans case is very similar to the reasons that he employed in Raley's case. [See petitioner's appendix, pgs. A22-A25.] In this case the Sixth Circuit expressly rejected the idea that the reviewing court could consider the defendant's (or habeas petitioner's) prior experience in criminal justice system in evaluating the validity of a guilty plea under collateral attack. "This rule would effectively deprive the recidivist of rights that a first time offender possesses." [Petitioner's Appendix, pg. A17; Raley v. Parke, 945 F.2d 137 at 142 (6th Cir. 1991).

From the foregoing authorities, the Commonwealth submits that the Nevada Supreme Court, Seventh Circuit, and the Eleventh Circuit, have adopted a rule placing the burden on the defendant to establish the invalidity of a prior conviction offered by the prosecution to

enhance the defendant's sentence and that the rule which those jurisdictions have adopted is substantially the same as that followed by Kentucky. The rule adopted by those jurisdictions is clearly contrary to the rule imposed on Kentucky by the Sixth Circuit in this case.

Review by this Court is clearly warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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